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No. 84-563

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CENTURY AIR FREIGHT, INC.,

Petitioner,

—versus—

AMERICAN AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

1. Did the Court of Appeals properly affirm the holding of the District Court that there is no implied private right of action for an air freight forwarder, itself a party regulated under the statute, under section 404 of the Federal Aviation Act, 49 U.S.C. § 1374?

2. Did the Court of Appeals properly affirm the District Court's grant of summary judgment on petitioner's Sherman Act claims, 15 U.S.C. §§ 1, 2, where petitioner's only charge is that respondent failed to provide space on one of many daily flights from New York to San Juan in the amount and under the terms sought by petitioner, and where petitioner offered no substantive evidence that American's actions were anything other than unilateral?

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—versus—

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The petition of Century Air Freight, Inc. ("Century") fails to demonstrate any "special and important reasons"[1] for this Court to review the decision of the Court of Appeals for the Second Circuit, which properly affirmed the District Court's dismissal of Century's claims based on section 404 of the Federal Aviation Act and its grant of summary judgment to American Airlines, Inc. ("American") on Century's Sherman Act claims.

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1 U.S. Sup. Ct. Rule 17.1.

Statement Of The Case

Century has been prosecuting this case against American for more than seven years. Century exhaustively and baselessly resisted the resolution of this matter by the Civil Aeronautics Board, appealing to the full Board, to the Court of Appeals for the District of Columbia (which affirmed the Board's action), and petitioning this Court for a writ of certiorari (which was denied). The District Court for the Southern District of New York then found Century's complaint without legal merit (as to the Aviation Act claim) and without substance (as to the Sherman Act claim). The Court of Appeals affirmed on the basis of the District Court's opinion and denied Century's petition for rehearing in banc. Now Century seeks again to have this Court review a decision that is consistent with settled law and which does not concern any issue of special public importance.

Procedural Background

Century's complaint, alleging violation of the unjust discrimination provisions of section 404 of the Federal Aviation Act, 49 U.S.C. § 1374, and of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, was filed on May 5, 1977. The basic allegation of the complaint, which was filed in the Southern District of New York, is that American did not provide Century, an air freight forwarder, with a daily allocation of containerized space on the southbound leg of a particular, already fully-booked American flight from New York to San Juan. (JA 8a-24a)[2] In response to American's motion for primary jurisdiction dismissal, which was made before any answer had been filed or any discovery taken, Century stipu-

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2 References to "JA" denote pages in the main volume of the Joint Appendix filed in the Court of Appeals. References to Volume II of that Joint Appendix are denoted as "JA II."

lated to having the matter referred to the Civil Aeronautics Board (the "Board" or "CAB") and to having its case placed on the District Court's suspense docket. (JA 68a-69a, 78a; JA II 73a-74a)

On December 14, 1979, the Board's Bureau of Consumer Protection instituted an enforcement proceeding alleging that American's allocation practices on that southbound leg, designated Flight No. 841, violated the unjust discrimination provisions of section 404(b) of the Federal Aviation Act. (JA II 237a-246a) American denied any violation of the Act (JA II 248a-257a); and on August 18, 1980, American and the Bureau reached agreement, before any hearing had commenced, on a consent order disposing of the Bureau's complaint, providing for the payment by American of a fine, and establishing a stated allocation system for reserved space on Flight No. 841. (JA 393a-411a) Century opposed the settlement (JA II 412a-422a) and fought vigorously to overturn it. Its objections, however, were rejected by the administrative law judge (JA II 445a-453a), the Civil Aeronautics Board (JA II 3a-7a), and then the United States Court of Appeals for the District of Columbia Circuit. 679 F.2d 261 (1982)(JA 83a). Century's petition for certiorari was denied by this Court on October 18, 1982. 459 U.S. 943.

Pursuant to Century's request, the District Court then reactivated this action on July 1, 1983. (JA 85a) On July 6, 1983, still before any answer by American, Century moved for summary judgment on both its Sherman Act and Aviation Act claims. (JA 86a, 87a) American cross-moved for dismissal of the section 404 claims and for summary judgment on the Sherman Act claims. (JA 120a-122a) By opinion dated January 5, 1984, the District Court denied Century's summary judgment request, granted both aspects of American's cross-motion, and dismissed Century's complaint. The District Court held that an air freight forwarder has no private right of action under section 404 and that Century had put no facts in issue that could convert American's unilateral customer selec-

tion into a Sherman Act claim. (5a-29a)[3] After hearing oral argument, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court on the opinion below. 738 F.2d 418 (3a-4a). Century moved for rehearing in banc, which the Court of Appeals denied on July 10, 1984. (1a-2a)[4]

Facts

In 1971, American acquired Trans Caribbean Airways, Inc., which operated several daily combination passenger/freight flights and an evening all-freight flight from New York, New York to San Juan, Puerto Rico. Pan American and Eastern Airlines also offered wide-body combination passenger/freight flights from New York to San Juan. (JA 148a-151a) Shortly after the acquisition, American instituted a successor flight to Trans Caribbean's evening freight flight on the same route, replacing the Boeing 727 aircraft which had been used with a larger Boeing 707. (JA 138a-139a)

The southbound leg of this flight was designated No. 841 (originally 801); the northbound return was Flight No. 840 (originally 802). The flight operated five days a week, with a scheduled departure from New York that varied between 11:00 p.m. and midnight, and the return from San Juan to New York leaving in the early morning after loading and refueling. Flights Nos. 841 and 840 were the two legs of one roundtrip flight, and were operated from March 1, 1971 until American discontinued the service on August 1, 1981. (JA 138a)

The Boeing 707 freighters used on the flight had a capacity of eleven or twelve standard "A" type freight containers on the main deck (depending upon the configuration of the particular

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3 References such as "5a" are to the opinions below as set forth in the appendices to Century's petition.

4 Respondents received petitioner's Petition for a Writ of Certiorari on October 9, 1984.

plane). Two specially-contoured "A"-size containers could be carried in the tail section, and the cubic equivalent of three more "A" containers could be stowed as loose freight in the aircraft's belly. (JA 139a)

The dispute in this case centers on the availability on Flight No. 841 of standard, main deck "A" container "confirmed air freight" ("CAF") space. CAF space is space available pursuant to a recurring daily reservation. CAF space was offered by American to match the equivalent programs of other scheduled carriers and charter flights, and to meet its own need to plan for efficient utilization of the flight. This planning device, commonly used in the industry and referred to also as reserved air freight, meant that American provided the reserved space on a daily basis to the party with the CAF reservation, subject to regular use of the space by that party. The party with the reservation did not guarantee to pay for the space if freight was not tendered on a particular day, nor did American guarantee that the shipment, as tendered, would move on Flight No. 841. The system was merely a planning device, but with relatively few exceptions both American and the shippers honored these CAF reservations. (JA 140a)

These positions were offered on a first-come, first-served basis. By the end of 1971, each of the twelve main deck CAF positions available on Flight No. 841 had been reserved by air freight forwarders. These reserved positions were used on a recurring basis by these freight forwarders and were maintained by American as originally filled until 1978. (JA 140a-141a)

In the course of its general solicitation of new customers in 1971, American offered "A" container CAF space on Flight No. 841 to Century, but that offer was not accepted. Subsequently, when Century and others did request reserved container space on the flight, all available positions had been allocated and American was unable to comply with these later requests. When space was available on a particular day, tendered Century shipments would be carried, and in 1973,

American accommodated Century with a 100-pound reserved freight allocation (less than an "A" container). Century was also offered containerized CAF space on American's late night, passenger/freight combination flight from New York to San Juan (which carried containers smaller than "A"s); but that offer too was rejected, presumably because Century held six of eight reserved air freight positions on Eastern's late night combination flight. Century held two "A" container CAF positions on American's return Flight No. 840 from San Juan to New York throughout most of the flight's existence; and in September 1977, although Flight No. 841's twelve available main deck positions were still reserved, American accorded Century a recurring reservation for the cubic equivalent of one "A" container, with the understanding that the freight would be carried in the aircraft belly if main deck space was not available. (JA 141a-142a)

Thus, Century's suggestion (*see, e.g.*, Petition at 21) that American refused entirely to carry Century shipments is mistaken and is contradicted by the complaint itself (JA 20a, ¶¶ 25, 26). Rather, Century's true complaint is that other forwarders were not displaced so that it could have reserved "A" container space on southbound Flight No. 841 in their stead. Century does not challenge the concept of CAF reservations, the use of which on this very flight has been approved by the Civil Aeronautics Board and the Court of Appeals for the District of Columbia Circuit. (JA II 3a-7a; JA 83a) Century sues simply as a forwarder seeking a greater allocation of that space.

The majority of reserved "A" container positions on Flight No. 841 were used by Profit-By-Air, Inc. ("PBA"), a freight forwarder unaffiliated with American. PBA had provided the majority of freight flown on the predecessor Trans-Caribbean flight and continued with this volume on Flight Nos. 841 and 840. From the end of 1971 until the flight's termination in 1981, PBA used eight "A" container positions both northbound and southbound on the same terms and conditions as the other shippers on the flight. (JA 143a)

On several occasions PBA threatened, in response to schedule changes or proposed rate increases by American, to leave Flight Nos. 840 and 841 in favor of charter service. Such threats were not idle: charter planes were available and priced competitively with the cost of flying freight on American's flights. PBA's large volume of both south- and northbound freight made the charter option feasible. Indeed, in 1979 PBA chartered an aircraft for shipment of freight four times weekly from New York to San Juan and back. There was also the threat that PBA might go to another carrier and arrange for a flight to carry its freight. (JA 143a) American was reasonably apprehensive that if it reduced the number of positions PBA held on Flight No. 841, PBA would withdraw much or all of its freight from both Flight No. 841 and Flight No. 840.

The loss of PBA would almost certainly have caused the demise of Flight Nos. 840 and 841. The volume of southbound air freight into Puerto Rico greatly exceeds the return northbound volume, and consequently return Flight No. 840 frequently carried substantially less than a full load. Although American may have been able to fill PBA's positions on the southbound flight, the loss of PBA's business would have left much space unfilled on the northbound flight. Even with PBA's patronage, the roundtrip flight was not particularly profitable, and it is doubtful that American could have continued the flight if it lost PBA's business. (JA 144a-145a)

American cancelled Flight Nos. 840/841 and discontinued its late night all-freight service between New York and San Juan on August 1, 1981. (JA 138a)

Argument

I.

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISMISSAL OF PETITIONER'S AVIATION ACT CLAIMS FOLLOWED ESTABLISHED PRECEDENT AND SHOULD NOT BE REVIEWED BY THIS COURT.

While Century makes the bald assertion that the decision of the Court of Appeals brings that Court "into conflict with every other Circuit" concerning a purported private right of action for air freight forwarders under section 404 of the Federal Aviation Act (Petition at 2), Century cites no such conflicting authority—and for good reason. There is none. In affirming that freight forwarders lack a private right of action under section 404,[5] the Court of Appeals followed its own precedents and those of other courts that have considered analogous issues in the context of this Court's decision in *Cort v. Ash*, 422 U.S. 66 (1975).

In *Cort*, this Court rejected the common law presumption that "the mere violation of a statute entitled the injured party to redress its grievances through a private suit in federal court," *Diefenthal v. CAB*, 681 F.2d 1039, 1048 (5th Cir. 1982), *cert. denied*, 459 U.S. 1107 (1983). Instead, the Supreme Court constructed a four-part test to determine whether Congress had actually intended to create a private right of action for damages in favor of the particular plaintiff seeking to assert that right. The *Cort* test provides:

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5 Section 404(a) of the Federal Aviation Act, 49 U.S.C. § 1374, imposed on air carriers a general duty to carry, while section 404(b) prohibited unjust discrimination on their part. As noted in section II below, these provisions have, by statute and by regulation, been effectively repealed with respect to domestic (including Puerto Rican) air cargo transportation. *See* p. 12, *infra*.

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted.' *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? *See, e.g., National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? *See*, e.g., *Amtrak*, *supra*; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423 (1975); *Calhoon v. Harvey*, 379 U.S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? *See Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); *cf. J.I. Case Co. v. Borak*, 377 U.S. 426, 434 (1964); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-395 (1971); id., at 400 (Harlan, J., concurring in judgment)." 422 U.S. at 78.

Subsequently, this Court has refined the *Cort* test by emphasizing the need to find affirmative expressions of congressional intent before implying a right of action. *See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981) (legislative intent is the "key to the inquiry"); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

In holding that air freight forwarders do not possess an implied private right of action for damages against an air carrier under section 404 of the Federal Aviation Act, the District Court and Court of Appeals (through its affirmance) followed these precedents and properly applied the *Cort* crite-

ria. The District Court held that air freight forwarders are members of the regulated industry itself and not of the general public, and therefore are not especial beneficiaries of the statutory scheme. *See, e.g., Railway Express Agency, Inc. v. CAB*, 345 F.2d 445, 450 (D.C. Cir.), *cert. denied*, 382 U.S. 879 (1965) (air freight forwarding part of "an industry expressly committed by Congress to the exclusive regulatory power of the Board"); 14 C.F.R. §§ 296.3, 296.10(a)(3) (defining air freight forwarders as "indirect carriers" and making them subject themselves to the prohibitions of section 404(b) during the period in suit); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 37 (1977) (a regulated entity not an "especially benefited" party). The District Court also found there to be no legislative history indicating that a freight forwarder, or any private party, has an implied private right of action under section 404, citing *Caceres Agency, Inc. v. Trans World Airways, Inc.*, 594 F.2d 932, 933 (2d Cir. 1979). This legislative silence is particularly persuasive in light of Congress's specific authorization of a private right of action in another section of the Aviation Act, 49 U.S.C. § 1487(a). Allowing a damage action would also be inconsistent with the legislative scheme and would interfere with CAB enforcement, the District Court concluded. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (no private right of action where a statute provided for elaborate agency enforcement). (15a-17a)

In reaching and affirming this result, the courts below followed both *Cort* and precedents in the Second Circuit and in other circuits that have considered the existence of an implied private right of action under section 404(b) for other than individual passengers. In *Caceres Agency, Inc. v. Trans World Airways, Inc., supra*, for example, the Second Circuit rejected a claim by plaintiff, a travel agent, that it was the victim of alleged unjust discrimination in violation of section 404(b) as a result of alleged preferential commissions paid by three defendant airlines to other travel agents. The Court held that plaintiff had no private right of action for the alleged statutory

violation. *See also*, *Sanders v. Air India*, 454 F. Supp. 1371 (S.D.N.Y. 1978) (no right of action for travel agent); *Great Destinations, Inc. v. Transportes Aereos Portugueses*, 460 F. Supp. 1160, 1164-65 (S.D.N.Y. 1978) (no right of action for charter tour operator). Courts in other circuits considering section 404(b) under analogous circumstances since *Cort v. Ash* have reached similar results. *See, e.g.*, *Kodish v. United Air Lines, Inc.*, 628 F.2d 1301, 1302-3 (10th Cir. 1980) (no private right of action for pilot); *Montgomery v. American Airlines, Inc.*, 637 F.2d 607 (9th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981) (no right of action for skycap); *Polansky v. Trans World Airlines, Inc.*, 523 F.2d 332 (3d Cir. 1975) (denying tour members right of action).[6]

Century's only citation of allegedly "conflicting" authority is *Fitzgerald v. Pan American World Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956), a case from the same circuit as this one, which preceded by many years the decision in *Cort v. Ash*. The *Fitzgerald* decision relied upon the now-discredited common law presumption rejected in *Cort* and no longer has precedential value. Addressing this point in the specific context of section 404(b), the Fifth Circuit concluded that the holdings of pre-*Cort* section 404(b) cases "are not indicative of the inquiry into Congress' intent which *Cort v. Ash* requires that we make." *Diefenthal v. CAB*, *supra*, 681 F.2d at 1050. *See also*, *Sanders v. Air India*, *supra*, 454 F. Supp. at 1377 (rejecting pre-*Cort* holdings under § 404(b)); *Viking Travel, Inc. v. Air France*, 462 F. Supp. 28, 34 (E.D.N.Y. 1978) (rejecting pre-*Cort* holdings under § 403(b) of the Federal Aviation Act, 49 U.S.C. § 1373(b)). Equally important, *Fitzgerald*, like other

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6 No private right of action has ever been implied under section 404(a). *See Vandrey v. Lufthansa German Airlines*, 14 Av. Cas. (CCH). ¶ 17,788 (E.D. Pa. 1977); *Diefenthal v. CAB*, *supra*, 681 F.2d at 1049-50 (no private right of action under section 404(a) for injunctive relief); *National Small Shipments Traffic Conference, Inc. v. CAB*, 618 F.2d 819, 832, n.34 (D.C. Cir. 1980) (upholds CAB decision to exempt carriers from statutory duty to carry under section 404(a), and rejects argument that CAB took away statutory cause of action without due process, noting that petitioner cited no case showing cause of action existed under section 404(a)).

passenger cases, is fundamentally distinguishable by the fact that the plaintiff there was an individual member of the travelling public and not part of the regulated industry itself.

II.

THIS CASE PRESENTS NO ISSUE OF PUBLIC IMPORTANCE.

The Aviation Act issues in this case—arising under sections 404(a) and (b)—do not raise any important question of federal law which this Court must decide, since both provisions, as to the issues raised in this case, have ceased to be in effect. Pursuant to the Airline Deregulation Act of 1978, as of January 1, 1983, both sections 404(a) and 404(b) had been repealed, except for a continuing safety obligation, as to "air transportation of persons." 49 U.S.C. § 1551. In 1978, the CAB exempted domestic air freight carriers from any application of section 404(a)'s duty to carry. 14 C.F.R. § 291.31.[7] More recently, the CAB specifically exempted domestic air freight carriers from the provisions of section 404(b).[8] 48 Fed. Reg. 54592 (December 6, 1983); 14 C.F.R. § 291.31. This regulatory repeal was confirmed in the Civil Aeronautics Board Sunset Act of 1984, P.L. 98-443 (Oct. 4, 1984), which repealed (effective January 1, 1985) all aspects of section 404 for both passenger and cargo transportation, with the exception of a continuing duty to provide safe and adequate service. In these circumstances, with the statutory framework of this suit repealed, it is difficult to perceive any issue of public importance worthy of this Court's consideration.[9]

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7 Domestic cargo transportation includes the transportation of air freight between the mainland United States and Puerto Rico. *See* 14 C.F.R. § 291.2.

8 Century's assertion that section 404(b) remains in effect with respect to domestic air cargo transportation (*see* Petition at 14) is simply incorrect.

9 Section 1002(k) of the Aviation Act, 49 U.S.C. § 1482(k), which figures so prominently in Century's petition, is nothing more than a definitional section. It does not confer or create any rights or duties.

III.

THE COURT OF APPEALS PROPERLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT TO AMERICAN ON CENTURY'S SHERMAN ACT CLAIMS.

In response to a summary judgment motion, a plaintiff in an antitrust case has the burden to produce "significant probative evidence tending to support the complaint." *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968). Century failed to offer any evidence in support of its antitrust claims. Its bare suspicion and speculation were insufficient to preserve issues for trial. The Court of Appeals therefore properly affirmed the grant of summary judgment to American on these claims.[10]

While Century repeatedly uses the word "boycott" in its petition (*see, e.g.*, Petition at 28), Century failed to produce any evidence that American's actions were anything but unilateral. American independently analyzed the risks of losing

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10 Ordinarily, summary judgment will not be entered against a plaintiff until the plaintiff has had an opportunity to engage in discovery, *see, e.g., Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 109-10 (2d Cir. 1975), but this case presented an unusual situation for the District Court. When, after settlement of the CAB proceeding, Century reactivated its federal court action, it sought no discovery, nor even an answer from American. Taking the position that it had all the facts it needed, Century moved for summary judgment on all issues of liability, stating that discovery would be "sheer waste." (JA 117a) When American pointed to this statement in support of its cross-motion for summary judgment (JA 255a-257a), Century held to its conclusory allegations and sought no opportunity to uncover additional facts. In these circumstances, the District Court properly concluded that it did not need to delay its decision. It held that American should not be burdened with a "needless round of discovery" on Century's frivolous antitrust claims, especially when Century itself conceded that discovery would be wasteful. *Contemporary Mission, Inc. v. U.S. Postal Service*, 648 F.2d 97, 105 (2d Cir. 1981).

PBA as a customer and unilaterally determined not to reduce the space allocated to it. Century did not and could not present any evidence of "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Company v. Spray-Rite Service Corp.*, ___ U.S. ___, 104 S. Ct. 1464 (1984). Certainly, the fact that American and PBA occasionally met to discuss PBA's complaints about American's prices and services—the only evidence pointed to by Century—does not suggest the existence of an illegal conspiracy. This Court in *Monsanto* emphasized that the routine exchange of business information between distributors and suppliers, even with regard to prices, is necessary to assure an efficient market and must not be suppressed. ___ U.S. at ___, 104 S. Ct. at 1470. The fact that a supplier met with its principal customer several times over the course of a decade can scarcely be considered evidence of illegal concerted activities.

Century thus produced no "significant probative evidence" of an illegal contract, combination or conspiracy to exclude Century from Flight 841. Much less did Century offer evidence which would tend "to exclude the possibility that [American and PBA] were acting independently." *See Monsanto*, *supra*, ___ U.S. at ___, 104 S. Ct. at 1471. In fact, the evidence shows that, far from acting to exclude Century, American offered Century space when Flight 841 commenced and provided CAF space to Century in varying amounts throughout the life of Flight Nos. 840/841. (JA 141a-142a)

Century's section 2 claim, to the extent it has not been abandoned, is even more tenuous. Century failed entirely to support its claim that American had monopoly power in the transport of air freight from New York to San Juan, nor could it have. Flight No. 841 faced continued competition from other all-freight and combination passenger/freight, indirect and charter flights. (JA 143a-193a) In fact, American was forced to adjust its rates and schedules as a result of this competition, and other air freight forwarders successfully competed in freight forwarding between New York and San Juan during

this time period. *See Century Air Freight, Inc. v. Arrow Airways*, CAB Order No. 83-6-103 (June 23, 1983) at 5-6 (JA 266a-267a).

Moreover, Century has never explained how its exclusion from Flight No. 841 could have helped American maintain such a monopoly if one existed. The possession of monopoly power without the willful maintenance of that power does not violate section 2. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-1 (1966). As the District Court found, the identity of the customers on the flight would have no bearing on American's alleged monopoly (26a-27a). Thus, even if Flight No. 841 were a monopoly—which it clearly was not—there is no evidence of American improperly maintaining that monopoly. Even Century has admitted that lack of demand was the reason there was no other late night, all-cargo flight from New York to San Juan. (JA 97a) Where, as here, there was no evidence of monopoly power or of any maintenance of any such power if it existed, the Court of Appeals properly affirmed the grant of summary judgment on Century's section 2 claims.

Conclusion

For the reasons stated, Century's petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Pursuant to Supreme Court Rule 28.1, Respondent American Airlines, Inc. hereby declares that the following companies are parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Respondent:

Parent Company

AMR Corporation

Affiliates

Flagship International, Inc.
AMR Energy Corporation
American Airlines Training Corp.
AMR Services, Inc.
San Antonio Terminal Corp.
El Paso Terminal Corp.
Sky Chefs of Louisiana
Sky Chefs of San Antonio
Sky Chefs of Illinois
Sky Chefs of Fort Lauderdale

Subsidiary (not wholly owned)

AA Ventures I, Inc.